

July 18, 2005

Sandra K. Duveneck
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and Rehabilitation
1515 "S" Street, Room 537 North
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**Re: Your Request for Advice
Our File No. A-05-133**

Dear Ms. Duveneck:

This letter is in response to your request for advice regarding the filing of statements of economic interests ("SEIs") under the conflict-of-interest code provisions of Political Reform Act (the "Act")¹. Your request involves the former Youth and Adult Corrections Agency ("YACA") and the new California Department of Corrections and Rehabilitation ("CDCR").

QUESTIONS

1. May non-board member public officials, transferring from YACA to CDCR but with no material change in job duties, continue to file annual statements under the old conflict-of-interest code for YACA?
2. Are members of the new CDCR boards required to file new, full-disclosure statements of economic interests pursuant to section 87302.6?
3. How long does CDCR have to submit a conflict-of-interest code to the Commission for approval?

¹ Government Code sections 81000 – 91014. Commission regulations appear at title 2, sections 18109-18997, of the California Code of Regulations. All further references to statutory "sections" will be to the Government Code and all further references to "regulations" will be to title 2 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. Non-board member public officials, transferring from YACA to CDCR but with no material change in job duties, should continue to file annual statements under the old conflict-of-interest code for YACA until CDCR has a code that satisfies the requirements of the Act. We do not advise in this letter, however, whether any specific official has experienced a change in his or her duties altering the official's filing requirements under the Act.

2. Board members of the new CDCR are required to file new, full-disclosure statements, pursuant to section 87302.6 until CDCR has an approved code. This holds true even if a CDCR board member previously sat on the board of YACA and had less than full disclosure.

3. The CDCR has 90 days from the effective date of its creation, to submit a conflict-of-interest code to the Commission for approval or revisions.

FACTS

The Legislature recently created the California Department of Corrections and Rehabilitation, including several named divisions, a parole hearing board and an advisory body on correctional standards (collectively "CDCR"). This new umbrella organization, created pursuant to Senate Bill 737 (Stats. 2005, Chapter 10), will presumably incorporate the functions of several agencies which were abolished effective July 1, 2005: the Youth and Adult Corrections Agency, the Department of Corrections, the Department of Youth Authority, the Board of Prison Terms, the Board of Corrections, the Youth Authority Board, and the Narcotic Addict Evaluation Authority. The first five agencies had conflict-of-interest codes. The Youth Authority Board and the Narcotic Addict Evaluation Authority were covered in the code of one of the other agencies.

You write on behalf of the former Youth and Adult Corrections Agency and its subordinate departments (collectively "YACA") and the new CDCR and its new boards. You request information regarding if and/or how exempt staff, civil service employees, and YACA contractors are to file new SEIs. You provide little information regarding what if any former YACA positions: (1) are going to remain the same under CDCR; (2) are going to change slightly or significantly; or (3) are going to be completely eliminated. In this regard, you simply write that "[i]n some cases, exempt staff will be appointed to new positions while in other cases they will be appointed to basically the same jobs but under new titles."

ANALYSIS

A. General Laws Under The Act Regarding Conflict-Of-Interest Codes And Filing Obligations

One of the purposes of the Act is to ensure that public officials disclose their economic interests. (Section 81002(c).) Public officials who make or participate in the making of governmental decisions are required to file statements of economic interests whereby they disclose information regarding their economic interests. (See sections 87200 et seq. and 87300 et seq.)

The first category of filers, governed by sections 87200 et seq., includes most high-ranking elected officeholders. These 87200 filers (sometimes referred to as “statutory filers”) include, for example, elected state officers, judges, members of certain state commissions, heads of local governments, those who manage public investments, and candidates for any of the elected offices in this category. These officials are subject to the most expansive disclosure requirements possible under the Act due to the nature of their duties.

The second category of filers, governed by sections 87300 et seq., covers all other positions in an agency “which involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. . . .” (Section 87302(a).) People holding these positions are informally referred to as “designated employees” and their positions are listed in conflict of interest codes, which most governmental agency are required to adopt and promulgate. (Section 87300; see section 82019 [defining “designated employee”].) Unlike most high-ranking officials, many designated employees are required to make only limited disclosures of their economic interests, depending upon the duties associated with their positions. These positions, and their respective disclosure requirements, are listed in each agency’s conflict of interest code.

Members of many boards and commissions typically fall under “designated employee” category of filers and therefore file pursuant to sections 87300 et seq. But such members, when taking a seat on the board of a newly created agency, must file like section 87200 filers (i.e., full disclosure without exception) until the new agency creates and adopts an approved conflict-of-interest code. (Section 87302.6.) Once a code is adopted for a newly created agency, such members then file SEIs according to the new code, pursuant to section 87302. Public officials of new agencies that are not members of the new agency’s board or commission are simply obligated to file SEIs once their agency has adopted an approved conflict-of-interest code (which usually happens several months after a new agency is created).

Generally, new agencies have six months to adopt a code. (Section 87303.) On the other hand, agencies which experience changed circumstances must amend their codes within 90 days. (Section 87306.)

B. Filing Obligations Of Public Officials Moving To CDCR

The basic question you pose appears to be as follows: whether non-board member public officials of a reorganized agency must file leaving office (and assuming office) statements even when they are now assigned to “basically the same jobs” in the new agency as those covered in the conflict-of-interest code of the prior-existing agency, and legislation states that the old regulations are still in effect. (Note: The following discussion does not pertain to those few public officials who are members of the governing board or commission of the CDCR; such officials will be dealt with in Section C of this letter, below.)

The answer generally depends upon whether the reorganized agency is considered to be a new agency that has no approved conflict-of-interest code. If the answer is no, the officials may continue to file annual statements and no leaving or assuming office statements would be required.

If the answer is yes, these officials generally have to file a leaving office (at the old agency) statement and an assuming office (at the new agency) statement after a new conflict-of-interest code for the new agency is adopted. Under the Act, the new agency has six months to submit an approved code, after which its code reviewing body has another 90 days to accept it or revise it, and then to either approve it as revised, or send it back to the new agency for further revisions. (Section 87303.) In the meantime, the officials, now at the new agency, are not covered by a conflict-of-interest code.

Based on the facts you have provided (e.g., describing the end of certain agencies under their former names) it appears that there is a new agency. This means that under normal circumstances, the officials moving from their abolished, old agencies to CDCR would have to file leaving office statements and, after a conflict-of-interest code is developed, an assuming office statement. However, a provision contained within the legislation creating the CDCR may change this result. The legislation creating the new CDCR (SB 737) generally states that regulations relating to the abolished agencies shall remain in force.

Of particular note is the following new language from SB 737 in section 12838.8:

“All regulations adopted by the predecessor entities, continuing entities, and any of their predecessors are expressly continued in force. Any statute, law, rule or regulation now in force, or that may hereafter be enacted or adopted with reference to the predecessor entities and any of their predecessors shall mean the Department of Corrections and Rehabilitation. Any action concerning these duties, responsibilities, obligations, liabilities, and functions shall not abate

but shall continue in the name of the Department of Corrections and Rehabilitation, and the Department of Corrections and Rehabilitation shall be substituted for the predecessor entities and continuing entities by the court wherein the action is pending. The substitution shall not affect the rights of the parties to the action.”

If section 12838.8 can be harmonized with the general provisions of the Act which dictate the filing obligations of officials, such officials could simply continue filing annual SEIs under their old agency’s conflict-of-interest codes until the CDCR promulgates its own conflict-of-interest code.

When faced with an apparent conflict of statutory authority, one court provided the following guiding principles: (1) ascertain the intent of the Legislature in drafting the law at issue; (2) give the law a reasonable and common sense meaning consistent with its apparent purpose, so as to serve a wise policy and to avoid absurd results; (3) give significance to every word or part, and harmonize the parts by considering them in the context of the whole; (4) consider context, object in view, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction; and (5) pursue consistent construction. (*DeYoung v. San Diego* (1983) 147 Cal.App.3d 11, 17; see Witkin’s *Summary of California Law* (9th Ed.) Vol. 7 “Constitutional Law” § 94.)

In applying the above principles, we find that section 12838.8 of the legislation creating the new CDCR should govern and non-board member public officials, continuing in similar jobs at the new agency, should simply continue to file SEIs pursuant to the conflict-of-interest code which covered them at their old agencies. Under the Act’s statements of purposes, assets and income of public officials which may be materially affected by their official actions should be disclosed so as to facilitate the avoidance of conflicts of interest. (Section 81002(c).) One of the best ways to achieve this purpose, particularly during times of transition in governmental organizations, is to make sure there is as little gap in filing obligations as possible.

Your central inquiry asks about the filing obligations of officials who will have, according to your description, “basically the same jobs” at the new agency as they had at the old one, but under new titles. According to the precepts of statutory construction stated above, we may harmonize the apparently contradictory statutory directives by considering them in the context of the whole. Under the specific circumstances presented here, we believe that we should treat the old agencies’ conflict-of-interest codes as still in effect (based upon the authority of new section 12838.8) and have those officials with similar jobs continue to file annual SEIs under their old conflict-of-interest code (and pursuant to 87302) until the CDCR promulgates a new conflict-of-interest code. Such an approach ensures there is a reduced gap in reporting by existing employees. If an old agency were treated as having no existing code, leaving office statements would be required but no assuming or annual statements would be due for the several months until the new code was adopted.² This conclusion furthers the purposes of the Act and meets with the goals of sections 87300-87312.

² As noted, generally under section 87303 an agency has six months to adopt a code.

You have not provided enough facts to determine if every designated position in the old conflict-of-interest codes generally matches a position in the new agency. Therefore, this letter does not provide advice regarding the specific filing obligations of any particular employee. Generally, persons holding positions enumerated in a code have been determined to make or participate in the making of decisions which may foreseeably have a material effect on their economic interests. (See regulation 18730(b)(2).) You should make these determinations and then have the non-board member designated employees continue filing SEIs under their old conflict-of-interest code until the new CDCR has an approved code. These officials would not have to file leaving office or assuming office statements. If you determine the duties of the new positions differ, then new positions have been created and, pursuant to section 87306, you have 90 days to submit a new code that encompasses all positions to ensure there is disclosure by officials holding the new positions.³

C. Filing Obligation Of The New Board Members Of CDCR

Your facts also present a unique question with respect to those public officials that are members of boards or commissions of newly created agencies which consolidate the functions of one or more abolished agencies. One issue is whether their disclosure obligations could continue on an annual basis under the old agencies' conflict-of-interest codes (just as those designated employees discussed above) or whether such board members would have to file anew.

Section 87302.6 was specifically enacted (SB 1620, Stats. 2002, Chapter 263) to ensure that members of the boards or commissions of newly created agencies have full and timely disclosure, without having to wait for the new agencies to adopt a new conflict-of-interest code. That section states:

“Disclosure by Members of Boards and Commissions of Newly Created Agencies

“Notwithstanding Section 87302, a member of a board or commission of a newly created agency shall file a statement at the same time and in the same manner as those individuals required to file pursuant to Section 87200. A member shall file his or her statement pursuant to Section 87302 once the agency adopts an approved conflict-of-interest code.”

This section has been further interpreted in regulation 18754. Together, section 87302.6 and regulation 18754 impose an interim financial disclosure obligation requiring

³ Although section 87306 generally applies to codes that have already been adopted, under the unique circumstances of this reorganization, we apply the 90-day deadline to CDCR, as opposed to the six-month deadline of section 87303. We believe this effectuates the purposes of the Act. (See section 81002(c).) Application of the six-month deadline under section 87303 would mean employees of the old agencies would have to file leaving office statements, but it would create a gap in reporting since assuming office statements would not be filed by any employee until the new CDCR code is submitted and approved.

a member of a board or commission of a newly created agency to file an SEI, at the same time and in the same manner as those individuals required to file pursuant to section 87200 of the Act, until the agency adopts an approved conflict-of-interest code.

Therefore, the question becomes: should board or commission members switching from the board or commission of an abolished agency, e.g., YACA, to a new agency, e.g., CDCR, be able to continue to file annually under YACA's old conflict-of-interest code? Or should such members be obligated to file anew under section 87302.6, regardless of whether the legislation creating the new agency (e.g., section 12838.8) states that all former regulations are still in effect? To answer this question, we look not only to the plain words of section 87302.6, but to evidence of the Legislature's intent behind the enacting of this legislation.

The analysis drafted by the Assembly Committee on Elections, Reapportionment and Constitutional Amendments explains SB 1620, the bill creating 87302.6, as follows:

“Under current law, it is possible that a person can serve on a new agency, board or commission and make decisions on rules, regulations, permits, and contracts for almost a year before they are required to file a Statement of Economic Interests (SEI) . . . SB 1620 will . . . require all newly appointed persons to state boards or commissions [to] file a Statement of Economic Interests according to [the requirements of the PRA] until the Agency adopts an approved conflict of interest code. The filing of SEI forms by members of new agencies, boards or commissions is critical, especially when many of the laws creating these boards have specific prohibitions against members who have had financial or other related dealings with the industry it oversees and regulates.”

Considering the stated intent for the creation of section 87302.6, and in light of the general principles of statutory construction delineated above, we conclude that all members of the boards of the new CDCR should file new, full disclosure SEIs pursuant to 87302.6.⁴ We believe that when you harmonize sections 87300-87312 with the legislation creating CDCR, and consider the general purposes of the Act, this is the correct conclusion. This means that any member of the new CDCR board subject to Senate confirmation has a duty to file no more than 10 days after appointment or nomination. (Regulation 18754(b)(1)(B).)⁵

⁴ Moreover, under the provisions of SB 737, it appears the composition of the new boards is significantly different from the old boards. For example, while the old Board of Prison Terms had nine members, the new equivalent board has 17 members.

⁵ Members not subject to Senate confirmation have 30 days after assuming office to file their SEIs. (Section 87202.)

D. Summary Of Conclusions

Non-board member public officials, transferring from YACA to CDCR but with no material change in job duties, should continue to file annual statements under the old conflict-of-interest code for YACA until CDCR has an approved code. Board members of the new CDCR board should file new, full-disclosure SEIs pursuant to section 87302.6. Finally, the CDCR has 90 days from the creation of new positions (new or different from the positions enumerated in the old YACA code) to submit a conflict-of-interest code to the Commission for approval.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Andreas C. Rockas
Staff Counsel, Legal Division

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